

BEFORE THE  
RESPIRATORY CARE BOARD  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

In the Matter of the Accusation and  
Petition to Revoke Probation Against:

KIM M. CUNNINGHAM,

Respiratory Care Practitioner License No.  
16251

Respondent.

Case No. R-2050

OAH No. N2007030293

**DECISION AFTER NONADOPTION**

Administrative Law Judge Ruth S. Astle, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on April 12, 2007. Catherine E. Santillan, Senior Legal Analyst, represented complainant. Respondent Kim M. Cunningham was present and represented herself. The matter was submitted on April 12, 2007. After due consideration thereof, the Respiratory Care Board (Board) declined to adopt said Proposed decision, and on or about May 18, 2007 issued an Order of Nonadoption. The Board requested written argument due on June 29, 2007. Written argument having been received from Complainant and Respondent, and the time for filing written argument in this matter having expired, the entire record, including the transcript of said hearing, having been read and considered pursuant to government Code section 11517, the Board hereby makes the following decision:

**FACTUAL FINDINGS**

1. Stephanie Nunez made the Accusation and Petition to Revoke Probation in her official capacity as the Executive Officer of the Respiratory Care Board of California (Board), Department of Consumer Affairs.
2. On May 26, 1993, the Board issued Respiratory Care Practitioner License No. 16251 to Kim M. Cunningham (respondent). The license was in effect at all times relevant to this matter, and will expire on September 30, 2008, unless renewed.
3. In a disciplinary action entitled "In the Matter of the Accusation Against Kim M. Cunningham," Case No. R-1884, the Board issued a decision, effective October 18, 2004, in which respondent's license was revoked. However, the revocation was

stayed for a period of three (3) years with certain terms and conditions. Respondent was initially placed on Board probation, based in part on her August 1, 2002 conviction of Vehicle Code section 23152(a), driving under the influence of alcohol, with a special allegation that her blood level was above .20% at the time of arrest.

4. Respondent was required, as part of her probation, to submit to random body fluid testing. On September 23, 2006, respondent reported as directed for biological fluid testing, as required by the conditions of her probation. The test results revealed the presence of cannabinoids/THC, indicating the presence of marijuana.

On December 12, 2006, respondent reported as directed for biological fluid testing, as required by the conditions of her probation. The test results revealed the presence of cannabinoids, ethyl glucuronide, and benzodiazepines. Respondent has a valid prescription for benzodiazepines. The presence of ethyl glucuronide indicates that respondent ingested alcohol.

Respondent did not have a doctor's recommendation for the use of marijuana.

5. Respondent's probation, Condition Two, requires respondent to participate in random biological fluid testing. Respondent failed to call the testing schedule inquiry number as required on eleven dates between November 25, 2004 and December 2, 2006. Respondent is required to call in every day.

Respondent did report for testing every time she called the testing schedule inquiry number and was required to report for testing.

6. Respondent's probation, Condition Three, requires respondent to abstain entirely from the possession or use of alcohol and other mood altering drugs unless properly prescribed by a health care practitioner. Chemical analysis of body fluid that respondent provided for testing on February 3, 2005, indicated the presence of ethyl glucuronide, a metabolite of ethyl alcohol. Respondent admitted to drinking a glass of wine. Chemical analysis of the body fluid respondent provided for testing on September 23, 2006, yielded a positive result for the presence of cannabinoids/THC, indicating the presence of marijuana. A similar analysis on December 12, 2006, revealed the presence of cannabinoids and ethyl glucuronide. Respondent also tested positive for ethyl glucuronide on February 6, 2007.

7. Respondent's explanation for the marijuana in her system was that her friend gave her some candy that had marijuana in it. She was unaware of the contents of the candy. Respondent's friend testified at the hearing that he has a physician's recommendation for marijuana use. He makes candy with marijuana in it to help a stomach condition. Without thinking about the contents of the candy, he gave a bag of the candy to respondent. After respondent discovered that the candy contained marijuana, she stopped eating it. She has not tested positive for cannabinoids since December 12, 2006. Respondent's witness and respondent agreed on the approximate date that he gave respondent the candy: September 2006. However, their testimony

differed concerning when he told respondent that the candy contained marijuana. However, there was no evidence concerning how long marijuana stays in the system and can be detected. Respondent testified that she will be much more careful about what she ingests.

8. Respondent's explanation for the ethyl alcohol metabolite in her system in December 2006 and February 2007 was that she took over-the-counter cold medications and cooks with wine. These excuses are not adequate. Respondent stated that she will read labels and not cook with wine anymore.

9. Respondent is presently employed at Santa Clara Valley Health & Hospital System. She presented letters from both of her supervisors. They find her dependable, professional and punctual.

10. Respondent presented three additional character letters. Maria Benik is a co-worker who finds that respondent has a passion for her job. She knows about respondent's past problem with the Board and has never seen respondent under the influence of alcohol or anything else. She observes that respondent loves her job.

Nancy J. Cunningham (no relationship to respondent) has known respondent for twelve years and worked with her at her previous employment. She states that respondent's skill is above average and that respondent takes great pride in her profession.

Janet Parr also worked with respondent at her previous employment. She finds respondent to be compassionate, loyal, and to learn from her mistakes.

11. Respondent was aware that her probation conditions required her to abstain from alcohol and controlled substances, yet she admitted drinking a glass of wine, and using over the counter medications containing alcohol, as well as cooking with wine. Her testimony that she was not aware that the candy she ate contained marijuana was self-serving. Respondent was placed on probation and has violated that trust by her repeated violations. She admitted that she drank wine and continued to use products containing alcohol which evidences a clear disregard for the Board's probationary terms.

12. Costs certifications in the amount of \$2,144.00 and \$1,237.25 were submitted for a total of \$3,381.25. It was not until just prior to the hearing in this matter that respondent provided the Board with her and her supervisor's quarterly reports and payment of the overdue and outstanding probation monitoring payments. But for this action it is not certain that these deficiencies with Respondent's probationary terms would have been met. Accordingly, the Board does not believe that a reduction of complainant's costs is warranted.

## LEGAL CONCLUSIONS

1. By reason of the matters set forth in Finding 4, cause for disciplinary action exists pursuant to Business and Professions Code section 3750.5, subdivisions (a) and (b) (illegal use of controlled substance).
2. By reason of the matters set forth in Findings 5, and 6, cause for violation of respondent's probation pursuant to conditions two (biological fluid testing) and three (abstention from use of any and all mood altering substances) exists.
3. The matters in mitigation, extenuation and rehabilitation set forth in Findings 7 through 10 have been considered in making the following order.

## ORDER

Respiratory Care Practitioner License No. 16251 issued to Kim M. Cunningham is hereby revoked.

If she chooses to apply for reinstatement, respondent's reinstatement shall be subject to her payment to the Board of its costs of investigation and prosecution of this case in the sum of \$3,381.25.

This order shall become effective on September 20, 2007.

IT IS SO ORDERED this 13th day of September, 2007.

Original signed by: \_\_\_\_\_  
LARRY L. RENNER, BS, RRT, RCP, RPFT  
PRESIDENT, RESPIRATORY CARE BOARD  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA